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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

FATEMA QASSIMYAR, Plaintiff and Appellant, v. CHILDREN'S HOSPITAL SAN DIEGO et al., Defendants and Respondents.	D052134 (Super. Ct. No. GIC858894)

APPEAL from a judgment of the Superior Court of San Diego County, Yuri Hofmann, Judge. Affirmed.

Fatema Qassimyar appeals from a judgment in favor of Nicholas Saenz, M.D., Henry Krous, M.D., Denise Malicki, M.D., Deborah Schiff, M.D., and William Roberts, M.D. on her lawsuit seeking damages assertedly sustained after she underwent surgery to remove an abdominal mass, resulting in the removal of four of her surrounding organs. The trial court had granted defendants' summary judgment motions, ruling in part that plaintiff did not present admissible evidence rebutting expert declarations stating that

defendants' medical care and treatment complied with the applicable standard of care, or showing that her parents' surgical consents were not based on full disclosure. Plaintiff appeals, challenging the grant of summary judgment on grounds she raised conflicting evidence on her causes of action for negligence, breach of fiduciary duty and breach of contract. She further contends the court erred by sustaining demurrers to her causes of action for battery and fraud. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On appeal from the grant of summary judgment, the reviewing court is required to view the evidence in the light most favorable to plaintiff, the party opposing summary judgment. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*); *Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 139.) Having said this, we are compelled to point out that while plaintiff purports to dispute virtually every fact set forth in the defendants' respective separate statements, her asserted contrary facts are for the most part conclusory or argumentative assertions that do not directly contradict defendants' facts. Issues of fact preventing summary judgment are created by admissible evidence, not by broadly phrased and conclusory assertions. (*Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1524 [to avoid summary judgment, party must produce admissible evidence raising a triable issue of fact]; *Pacific Gas & Electric Co. v. City of Oakland* (2002) 103 Cal.App.4th 364, 371 [same]; *Sinai Memorial Chapel v. Dudler* (1991) 231 Cal.App.3d 190, 196.) We disregard these kinds of assertions.

Further, in her opposing separate statements, plaintiff primarily relies on the declaration of her father, Akhtar Qassimyar, apparently a physician with a medical degree from Kabul University School of Medicine, which the trial court rejected as competent expert testimony on the medical standard of care.[1] Plaintiff does not meaningfully challenge the trial court's evidentiary rulings in her opening brief. "[F]or purposes of reviewing a motion for summary judgment, we do not consider evidence 'to which objections have been made and sustained.' [Citation.] Where a plaintiff does not challenge the superior court's ruling sustaining a moving defendant's objections to evidence offered in opposition to the summary judgment motion, 'any issues concerning the correctness of the trial court's evidentiary rulings have been waived. [Citations.] We therefore consider all such evidence to have been "properly excluded." ' " (*Alexander v. Codemasters Group Limited, supra*, 104 Cal.App.4th at pp. 139-140, quoting *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334; *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65-66.) We summarize the background facts applying these principles.

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1 In his opposing summary judgment declaration, Dr. Qassimyar states: "I graduated with a medical degree from Kabul University, School of Medicine and am licensed to practice medicine. I had been practicing surgery in multiple hospitals since 1981. I have special knowledge, skill, experience, training and education in medicine and have examined and treated thousands of patients throughout my medical practice. I have never been sued for medical malpractice throughout my professional medical career. I successfully passed the United States Medical Licensing Exam (USMLE) and satisfied all the requirements of the commission. I always study medical textbooks and keep myself up-to-date with new information and advances in the medical field." Dr. Qassimyar sought to rehabilitate and expand on his qualifications in a supplemental declaration, which the court rejected as improper and untimely new evidence.

In June of 2003 (all date references are to the year 2003), plaintiff, who was 16 years old at the time, was found to have a 10-centimeter mass in her mid-abdomen after she presented to the Children's Hospital emergency room complaining of a hardness in her stomach area and abdominal pain. On June 22, Dr. Saenz, a pediatric surgeon, consulted with plaintiff and recommended she undergo medical resonance imaging (MRI). He discussed plaintiff's condition with her parents and tentatively scheduled a surgery to remove the mass. The MRI revealed a "large spherical mass tak[ing] up the area of the pancreatic body."

On June 23, Akhtar Qassimyar signed a consent form, also signed by Dr. Saenz and a nurse witness, authorizing Dr. Saenz to perform surgery to remove the abdominal mass and "possible removal of portion of intestine."[2] That day, Dr. Saenz surgically incised plaintiff's abdomen and took a biopsy of the mass to send to pathology. The next day, Dr. Laura Martin, an oncologist who two days earlier had dictated an admitting

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[2] The "Consent to do Surgery or Special Diagnostic or Therapeutic Procedures" form states (with handwriting in brackets): "I hereby authorize [Saenz] and associates to perform the following procedure/surgery: [Removal of abdominal tumor; possible removal of portion of intestine.] [¶] My physician has described the proposed procedure/surgery to me and has told me about the potential risks and expected benefits as well as other methods of treatment available and their risks and benefits, and the risks associated with refusing the recommended procedure/surgery. My physician has given me the chance to ask questions about the proposed procedure and all of my questions have been answered to my satisfaction. I understand that all procedures and/or surgeries involve risks of poor results, complications, injury or death from both foreseen and unforeseen causes. No warranty or guarantee has been made as to the result or cure and I understand that further treatment may be necessary in the future. I consent to the performance of the procedure/surgery noted above, in addition to any different or further procedures, which in the opinion of my supervising or attending physician or surgeon, is indicated during the performance of the procedure/surgery."

history and physical for plaintiff, noted the mass was consistent with a neuroendocrine tumor, and that final pathology was pending.

On June 23, Dr. Malicki, a board certified pathologist, diagnosed the tissue as a "papillary and solid epithelial neoplasm [tumor] of the pancreas." She commented that that type of tumor was rare, accounting for only two to three percent of primary pancreatic tumors. According to Dr. Malicki, the reported therapy of choice was surgical excision. She reported that Dr. Krous, a board-certified pediatric pathologist, concurred with her interpretation.

Two days later, Dr. Saenz noted that the final pathology report indicated plaintiff's mass was a solid papillary tumor of the pancreas. His notes state in part: "Dr. Martin and myself have meet [*sic*] with [patient's] mother and father. [¶] I have explained the [diagnosis], natural history, patterns of potential spread. I have explained that curative resection will require pancreaticduodenectomy (Whipple's operation).[3] They understood and were given ample opportunity to ask questions." Dr. Saenz scheduled plaintiff for surgery on June 27. Dr. Martin also noted that she met with plaintiff's parents, Dr. Saenz and a social worker to discuss the diagnosis, and that they seemed to understand their explanation, the pathologic diagnosis and the rationale for surgery.

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3 A pancreaticduodenectomy is a complete removal of the pancreas and partial removal of the duodenum. The procedure is also referred to as a Whipple procedure, named after surgeon Allen Whipple. (See Merriam-Webster Medical Dictionary <http://www.nlm.nih.gov/medlineplus/mplusdictionary.html> [as of September 9, 2008].) Defendants' briefing unhelpfully contains extensive use of undefined medical terms. To the extent we provide simplified explanations for those terms, it is by use of the above-referenced online medical dictionary.

According to plaintiff's father, during this meeting, the defendants told him they had wrongly diagnosed plaintiff's tumor as a neuroendocrine malignancy, and advised him she had another tumor requiring a further surgery. They also assured him plaintiff would not be diabetic after the second operation.

On June 27, Dr. Saenz noted he had a lengthy conversation with plaintiff's parents and that he explained the "goals" and "risks" of the operation. He wrote: "Total pancreatectomy, splenectomy [spleen removal] also mentioned." He noted that he had obtained informed, written consent. Plaintiff's mother signed the consent form for a procedure described as, "Removal of pancreatic tumor. Requires removal of duodenum. May require total removal of pancreas, possible removal of spleen. [¶] (Whipple's operation.)" The consent form contained the same verbiage as the form plaintiff's father signed days earlier. That day, plaintiff underwent surgery in which her pancreas, gallbladder, spleen and portions of her duodenum were removed.

Plaintiff filed a "complaint for the removal of four organs" against Drs. Saenz, Malicki, Krous, Schiff and Roberts (in addition to numerous other individuals and entities not parties to this appeal). Through demurrers and amendments, the operative complaint became plaintiff's second amended complaint containing causes of action for breach of fiduciary duty, breach of contract, battery and "gross negligence." Plaintiff alleged that defendants removed "four normal-functioning organs," and that defendants falsely stated she had a dangerous malignancy when there was no evidence of malignancy. She alleged defendants removed her organs "without [her] parents consent or any prior discussion at all"; that they "neither disclosed a single risk inherent in the removal of each of Plaintiff's

four organs nor did they recommend an alternative to the removal of each of the organs to the Plaintiff's parents . . ." Plaintiff alleged defendants did not disclose foreseeable permanent injuries and complications, and that as a result of the removal of her organs, she needs permanent medical care on a daily basis. In connection with her breach of fiduciary duty cause of action, plaintiff alleged in part that her parents trusted defendants to remove only the abdominal mass, and had they been told the truth they would not have consented to the second operation. She alleged her second operation was performed by a physician other than Dr. Saenz without her parents' knowledge or consent.

In connection with her cause of action for breach of contract, plaintiff alleged in part that her father told defendants that he and her mother would consent to the second operation only if they promised she would not be diabetic after the operation, and defendants made such a promise on which plaintiff's parents relied in consenting to the second operation. Plaintiff alleged defendants breached their promise, causing her permanent injuries and long term complications including rendering her a "zero-insulin diabetic." In connection with her "gross negligence" cause of action, plaintiff alleged (1) defendants performed a "blind" operation on June 23 for removal of her abdominal mass and removed four of her organs on June 27; (2) defendants caused foreseeable and permanent diseases and complications and failed in their duty to disclose risks and complications inherent in the removal of her organs; (3) defendants performed an unauthorized medical procedure – the pancreaticduodenectomy or Whipple procedure – for removal of a benign (non-malignant) mass; (4) defendants were not competent to

perform the Whipple procedure; and (5) defendants removed her normal functioning organs without giving her parents the opportunity to seek a second independent opinion.

Each of the defendants moved for summary judgment on grounds plaintiff could not show their services or treatment violated the applicable standard of care or that they breached any fiduciary duty. Dr. Saenz also argued plaintiff could not show he breached a contract with her parents regarding the outcome of her surgery, or that any allegedly negligent act or omission on his part more likely than not caused plaintiff any injury. Defendants each submitted expert declarations by practitioners in their respective fields attesting that each defendant's recommendations, care and treatment (to the extent they treated plaintiff) met the relevant standard of care for practitioners in their field.

Plaintiff, in propria persona, opposed the motions in part by reiterating her allegations and arguing the defendants had not responded to or disputed the "triable facts" stated in her causes of action, which were based on "obvious facts . . . proven by millions of textbooks." She argued defendants had made multiple misrepresentations and had falsified her pathology and surgical reports and medical file, constituting unprofessional conduct. Plaintiff submitted an approximately 40-page declaration from her father, who made assertions about his daughter's pre-surgery and post-surgery symptoms and condition; recounted representations made by the defendants concerning her condition and the nature of the surgery; summarized his discussions with Dr. Saenz and Irvin Kaufman, the assistant Chief Executive Officer of Children's Hospital, and "board members" of Children's Hospital; explained circumstances of his review of the plaintiff's medical file; and purported to explain the function of the pancreas, duodenum, spleen and

gallbladder, the consequences to plaintiff of the removal of those organs, and the purported fact that the Whipple procedure was not recommended for the surgical treatment of plaintiff's benign mass. He referred to items of medical literature that plaintiff had lodged as exhibits. Plaintiff submitted her own declaration discussing her own pre-surgery symptoms and condition and largely repeating matters set forth in her father's declaration, including her own interpretation of her medical records. She asserted defendants had "dishonestly falsified" her pathology and surgical reports, as well as her medical file.

In reply, defendants submitted a lengthy list of objections to plaintiff's evidence. In part, defendants argued plaintiff had failed to present admissible expert evidence on the issues of the standard of care and causation, and plaintiff's and her father's declaration (being without sufficient foundation, personal knowledge, or showing of relevant qualifications) were not competent to defeat summary judgment. They asked the court to strike the medical literature attached to plaintiff's papers as inadmissible hearsay.

The court granted defendants' motions on grounds they had presented competent, admissible evidence that there was no triable issue of material fact, and plaintiff had not responded with evidence to refute those declarations. Determining plaintiff's case was one requiring expert testimony, the court ruled plaintiff had not established her medical doctor father was qualified to testify as an expert on the medical issues and/or standard of care relevant to her lawsuit or otherwise had personal knowledge on San Diego medical community standards. It ruled plaintiff's father's conclusory opinions had no evidentiary value and that the medical textbooks and literature he pointed to were inadmissible as

direct evidence of the medical standard of care. Following entry of judgment in defendant's favor, plaintiff filed the present appeal.[4]

DISCUSSION

I. *Summary Judgments*

A. *Standard of Review*

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except

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[4] Plaintiff's notice of appeal (a Judicial Council form) states she appeals from the judgment entered on November 1, 2007, and she checked boxes indicating the judgment was after an order granting summary judgment as well as after an order sustaining a demurrer. Plaintiff attached (but did not refer to in her notice of appeal) other judgments, including one entered in December 2007 in favor of defendant Sarah Minasyan, M.D. and the Regents of the University of California. While California Rules of Court, rule 8.100(a)(2) provides that "[t]he notice of appeal must be liberally construed," it also provides that "[t]he notice is sufficient if it identifies the particular judgment or order being appealed. . . ." "The rule of liberal construction does not permit appellate review of an unspecified order or judgment where the notice of appeal unambiguously evidences an intent to appeal from . . . one of several separate appealable orders or judgments." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra*, ¶ 3:130.5, pp. 3-54 to 3-55 (rev. #1 2006); accord, *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 239; *Allen v. Smith* (2002) 94 Cal.App.4th 1270, 1284; *DeZerega v. Meggs* (2000) 83 Cal.App.4th 28, 43.) We cannot construe plaintiff's notice of appeal as applying under the foregoing rule of liberal construction to the December 2007 judgment (or any other judgment or order) because the notice of appeal in this case unambiguously identified only the November 1, 2006 judgment in favor of defendants Saenz, Malicki, Schiff, Krous and Roberts. Because we have no jurisdiction to review any judgment or order other than the November 1, 2007 judgment and orders appealable from that judgment, we disregard plaintiff's challenges to orders sustaining demurrers brought by other defendants, including Children's Hospital, and to the trial court's order quashing service on Laura Martin, M.D.

that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. [Citation.] . . . [O]nce a moving defendant has 'shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established,' the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff 'may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . .' " (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476-477; see also Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar*, *supra*, 25 Cal.4th at pp. 854-855.) A defendant need not conclusively negate an element of the plaintiff's cause of action, but must only show that one or more of its elements cannot be established. (*Aguilar*, at p. 853; *Seo v. All-Makes Overhead Doors* (2002) 97 Cal.App.4th 1193, 1201.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar*, at p. 850, fn. omitted.) Although "the court may not weigh the plaintiff's evidence or inference against the defendants' as though it were sitting as the trier of fact, it must nevertheless determine what any evidence or inference could show or imply to a reasonable trier of fact." (*Id*. at p. 856, emphasis omitted.)

"On appeal, we exercise 'an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law.' [Citation.] 'The appellate court must examine only papers

before the trial court when it considered the motion, and not documents filed later. [Citation.] Moreover, we construe the moving party's affidavits strictly, construe the opponent's affidavits liberally, and resolve doubts about the propriety of granting the motion in favor of the party opposing it.' " (*Seo v. All-Makes Overhead Doors*, *supra*, 97 Cal.App.4th at pp. 1201-1202.)

B. *Analysis*

Plaintiff challenges the grant of summary judgment in connection with her negligence, breach of fiduciary duty and breach of contract causes of action. For each cause of action, she maintains she presented evidence from witnesses with personal knowledge – namely, her father and mother[5] – raising material factual issues requiring a trial.

In addressing these points, we apply not only the proper summary judgment standard of review set forth above, but other overarching appellate review principles. All litigants, including those acting in propria persona (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246-1247), are bound by the rule that "[t]he reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment. It is entitled to the assistance of counsel. Accordingly, every brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and

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[5] By order dated March 18, 2008, we struck the declaration of plaintiff's mother, Gululai Qassimyar, from the appellant's appendix.

pass it without consideration." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 594, p. 627.) Points are deemed abandoned when they are entirely unsupported by argument or reference to the record. (*City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239; *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699; *Renden v. Geneva Development Corp.* (1967) 253 Cal.App.2d 578, 591; Cal. Rules of Court, rule 8.204(a)(1)(C) ["Each brief must . . . [¶] . . . [¶] . . . [s]upport any reference to a matter in the record by a citation to the . . . record"].) And "[a]rguments should be tailored according to the applicable standard of appellate review." (*Sebago, Inc. v. City of Alameda* (1989) 211 Cal.App.3d 1372, 1388.) Even on de novo review from a summary judgment, issues not raised in an appellant's brief are deemed waived or abandoned. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.)

1. *Breach of Fiduciary Duty and Negligence*

In connection with her causes of action for breach of fiduciary duty and negligence, plaintiff for the most part accurately recites relevant general legal principles, including on the issue of informed consent. She also recites her opposing summary judgment evidence, repeating portions of her father's declaration. However, she fails to explain in any meaningful way with pertinent legal analysis *how* her evidence (which we have pointed out *ante* was rejected by the trial court on the issue of the relevant medical standard of care) raises a triable issue of material fact on her causes of action for negligence and breach of fiduciary duty; that is, she does not explain to what element or elements her cited evidence pertains or how it contradicts defendants' evidence on material issues. Nor does plaintiff challenge in her opening brief the trial court's ruling

on the sufficiency and admissibility of her father's declaration, including the court's assessment of his qualifications. As stated, because the trial court excluded plaintiff's father's declaration to the extent he purported to set forth the relevant medical standard of care, we do not consider this evidence in our assessment of the parties' papers. (*Alexander v. Codemasters Group Limited*, *supra*, 104 Cal.App.4th at pp. 139-140.)

We are left with plaintiff's bare assertions that the "foregoing evidence and sworn statements were submitted in opposition to the defendants' motion for Summary Judgment to the trial [c]ourt" and "if there is a genuine dispute as to material facts that must be resolved in trial, the Court order granting Summary Judgment to the defendants . . . should be reversed and the case should go back to the trial court for a trial." Such assertions, and plaintiff's briefing as a whole, simply does not demonstrate she presented evidence contradicting defendants' expert evidence stating each defendant met the relevant medical standard of care in their recommendations, care and treatment.

We turn to plaintiff's assertion that the defendants failed in their duty to provide informed consent. Because the undisputed evidence reveals that Dr. Saenz was the only party to this appeal having direct contact with plaintiff's parents, the issue of lack of informed consent pertains only to him. (*Wilson v. Merritt* (2006) 142 Cal.App.4th 1125, 1134, citing *Townsend v. Turk* (1990) 218 Cal.App.3d 278, 287 [consulting radiologist who reports directly to referring physician is not responsible for making disclosures directly to the patient] and *Mahannah v. Hirsch* (1987) 191 Cal.App.3d 1520, 1527-1528 [same with respect to consulting pathologist]; see also *Spann v. Irwin Memorial Blood Centers* (1995) 34 Cal.App.4th 644, 656, fn. 11.) As plaintiff correctly observes, the

existence of informed consent is usually a question of fact. (*Arato v. Avedon* (1993) 5 Cal.4th 1172, 1186; *Wilson v. Merritt*, at p. 1134; *Quintanilla v. Dunkelman* (2005) 133 Cal.App.4th 95, 115.) Plaintiff also correctly observes that to recover for a doctor's failure to disclose inherent and potentially involved risks of proposed treatment, a plaintiff must also prove causation; that there is a " 'causal relationship between the physician's failure to inform and the injury to the plaintiff.' " (*Spann*, at p. 657, quoting *Cobbs v. Grant* (1972) 8 Cal.3d 229, 245.) "*Such causal connection arises only if it is established that had revelation been made consent to treatment would not have been given*.' [Citation.] Moreover, causation must be established by an *objective* test: that is, the plaintiff must show that reasonable 'prudent person[s]' in the patient's position would decline the procedure if they knew all significant perils." (*Spann*, at p. 657.) Thus, a patient's (or, in this case the patient's parent's) declaration that he or she would have sought other treatment had the patient been accurately informed of the risks is not sufficient to defeat summary judgment. (*Id*. at p. 659; *Warren v. Schecter* (1997) 57 Cal.App.4th 1189, 1206-1207.)

Here, Dr. Saenz presented an expert declaration from Donald Shaul, M.D., a pediatric surgeon, who averred that had plaintiff's 15 centimeter (nearly 6 inch) tumor not been surgically removed and had been allowed to grow, it would have caused life-threatening complications including intestinal blockage and/or a blockage of the biliary system which could lead to potentially fatal cholangitis (inflammation of the bile ducts), as well as serious complications such as obstructed blood vessels and growth of the tumor into the musculature of plaintiff's back. He stated that due to the life-threatening

complications, "to a reasonable medical probability, if plaintiff's tumor had been allowed to grow, it is my opinion that to do nothing with respect to the large tumor was not a reasonable option for [plaintiff] in June 2003. While my review of the records indicates that [plaintiff's] parents consented to plaintiff's surgery after being adequately informed of the risks, benefits and alternatives, it is also my professional opinion that no prudent parent of a patient in plaintiff's situation would have refused to authorize this medically necessary surgery for their child after being advised of the risks, benefits, and alternatives."

Plaintiff has not presented competent expert evidence rebutting Dr. Shaul's conclusion. As a result, she is unable to demonstrate a triable issue of material fact exists on the element of causation, and summary judgment was properly granted in defendants' favor with respect to her claim of lack of informed consent.

2. *Breach of Contract*

Plaintiff's breach of contract cause of action is based on her allegation that Dr. Saenz promised her parents that she would not become diabetic after undergoing the June 27 operation and breached that promise when he performed an operation that made her diabetic "forever." Generally, the elements of a breach of contract cause of action are the existence of the contract, performance by the plaintiff or excuse for nonperformance, breach by the defendant and resulting damages. (*First Commercial Mortgage Co. v. Reece* (2001) 89 Cal.App.4th 731, 745; *St. Paul Fire and Marine Ins. Co. v. American Dynasty Surplus Lines Ins. Co.* (2002) 101 Cal.App.4th 1038, 1060; *Vu v. California Commerce Club, Inc.* (1997) 58 Cal.App.4th 229, 233 [essential element of a claim for

breach of contract are damages resulting from the breach].) Causation of damages in contract cases requires that the damages be proximately caused by the defendant's breach. (*First Commercial Mortgage Co. v. Reece*, at p. 745; Civ. Code, §§ 3300, 3301; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 870 ["It is essential to establish a causal connection between the breach and the damages sought"].) "The test for causation in a breach of contract . . . action is whether the breach was a substantial factor in causing the damages." (*US Ecology, Inc. v. State* (2005) 129 Cal.App.4th 887, 909.)

In medical malpractice cases, "a doctor may be held liable on a theory of breach of contract where he has clearly and unequivocally warranted that a course of treatment recommended by him will, inevitably, produce a certain result." (*Pulvers v. Kaiser Foundation Health Plan, Inc.* (1979) 99 Cal.App.3d 560, 564-565, referring to the holding in *Depenbrok v. Kaiser Foundation Health Plan, Inc.* (1978) 79 Cal.App.3d 167, 171; *McKinney v. Nash* (1981) 120 Cal.App.3d 428, 442; see also *Brown v. Bleiberg* (1982) 32 Cal.3d 426, 431, fn 1 [generally acknowledging cause of action].) To recover on such a cause of action, the surgeon must clearly promise a particular result (as distinguished from a mere generalized statement) and the patient must consent to treatment in reliance on that promise. (*Depenbrok*, at p. 171; *McKinney v. Nash*, at p. 443; *Jamison v. Lindsay* (1980) 108 Cal.App.3d 223, 234.)

Here, plaintiff's appellate briefing on her breach of contract cause of action suffers from the same flaws that we have noted above in connection with her breach of fiduciary duty and negligence causes of action. "An appellate court is not required to examine

undeveloped claims, nor to make arguments for parties" (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106); its role is to evaluate " 'legal argument with citation of authorities on the points made.' " (*People v. Stanley* (1995) 10 Cal.4th 764, 793.) On this ground alone, we could uphold summary judgment as to this cause of action.

In any event, we conclude as with her other causes of action, plaintiff cannot establish a triable issue of material fact requiring a jury trial on the elements of the existence of a contract and reliance or resulting damage. As for the element of resulting damage, the sole evidence of plaintiff's resulting diabetes is the declaration of her father, who averred in part: "As [a] result of the removal of the Plaintiff's normal functioning pancreas, on 06/27/2003, the Defendants made the normal Plaintiff permanently diabetic which is the result of the destruction of only one insulin hormone produced by the pancreas." The court, however, excluded Dr. Qassimyar's declaration to the extent he sought to testify on the medical issues involved in the case. This includes the results or outcome of the surgery, and plaintiff's post-surgery condition. Because Dr. Qassimyar's medical conclusions were excluded from evidence, plaintiff lacks evidence demonstrating any link between Dr. Saenz's purported warranty and plaintiff's parents' decision to have her undergo surgery or plaintiff's resulting diabetes.[6]

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[6] We asked the parties to provide supplemental briefing on these points. According to defendants' letter brief, Dr. Saenz acknowledged in his summary judgment motion that the removal of plaintiff's pancreas did in fact render her a diabetic. Defendants did not cite to, and we were unable to locate, such a reference in the evidence presented on Dr. Saenz's behalf, either from his own declaration or that of Dr. Shaul. In any event, as we explain below, we uphold the trial court's summary judgment on several additional grounds, including that plaintiff is conclusively bound by the factual assertions made in

Further, as we have summarized above, Dr. Saenz's evidence established that plaintiff's June 27 surgery was required out of medical necessity, the existence of which was established by the declaration of Dr. Saenz's expert who testified that no prudent person would have refused to undergo the surgery had they been accurately informed of the result. Thus, even if Dr. Saenz had advised plaintiff's parents that the surgery would render her a diabetic, it is undisputed here that a reasonably prudent person would have nonetheless undergone the procedure given the alternative life-threatening consequences. For this reason, plaintiff cannot raise a triable issue of material fact as to causation.

Finally, we uphold summary judgment on plaintiff's breach of contract cause of action as a matter of law on grounds the language of the consent form signed by plaintiff's mother for the June 27 surgery conclusively proves that no express contract or warranty was made by Dr. Saenz. The trial court noted that the evidence was disputed as to whether Dr. Saenz made the asserted promise. Such a conflict would normally preclude summary judgment. But as Dr. Saenz pointed out in his motion for summary judgment, the consent form signed by plaintiff's mother and Dr. Saenz states that "no warranty or guarantee has been made as to the result or cure . . . ." In his moving summary judgment declaration, Dr. Saenz denied ever having made any promise or warranty to plaintiff's parents. Evidence Code section 622 provides: "The facts recited in a written instrument are conclusively presumed to be true as between the parties thereto,

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the informed consent form and thus cannot demonstrate a triable issue for the jury on the element of the contract's existence.

or their successors in interest; but this rule does not apply to the recital of a consideration." Though Dr. Qassimyar sought to prove Dr. Saenz made a warranty of a specific surgical outcome by his declaration, his declaration is directly contradicted by the written consent form signed on plaintiff's behalf. Plaintiff is bound by the written factual recitals in that instrument. (Evid. Code, § 622; *Banco Do Brasil, S.A. v. Latian, Inc.* (1991) 234 Cal.App.3d 973, 995, fn. 30.)

In this respect, the present case differs from *Quintanilla v. Dunkelman, supra*, 133 Cal.App.4th 95, in which the Second District Court of Appeal, on appeal from a jury verdict, addressed whether a Spanish language signed consent form that the patient could not read and was never translated into English at trial was conclusive proof of informed consent. (*Id*. at pp. 115-116.) The court held that even assuming Evidence Code section 622 applied, it would not provide grounds for reversal in favor of two of the defendants (a doctor and surgical medical group) because there was no proper translation at trial and the court had no way of knowing the content of the recital or whether the form constituted an instrument within the meaning of Evidence Code section 622. (*Id*. at pp. 116-117.) In dicta, the court went on to observe that while decisions had applied Evidence Code section 622 to documents other than a contract (e.g., a transfer of property and estoppel certificate), there was no authority to support an argument that Evidence Code section 622 applied in the context of informed consent. (*Id*. at p. 117.) The court stated such application would not foster the purposes of that doctrine for frank and open disclosure, especially where there was substantial evidence the patient was unable to read

the consent form and did not understand its language or the procedures that were going to be performed on her. (*Ibid*.)

Aside from constituting dicta that we decline to adopt, *Quintanilla* is inapposite. We are presented here with plaintiff's *breach of contract* cause of action alleging Dr. Saenz made a specific representation or warranty, which, unlike *Quintanilla*, directly contradicts an unambiguous factual statement in the consent form signed by both plaintiff's representative (her mother) and the physician. The Evidence Code does not define the term "instrument." (See Evid. Code, §§ 100-260 [definitions].) " 'Words used in a statute . . . should be given the meaning they bear in ordinary use.' " (*Sisemore v. Master Financial, Inc.* (2007) 151 Cal.App.4th 1386, 1400, quoting *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) The Merriam-Webster's Collegiate Dictionary defines "instrument" as "a formal legal document (as a deed, bond, or agreement) . . ." (Merriam-Webster's Collegiate Dict. (11th ed. 2006) p. 649, col. 1; see also *Sisemore v. Master Financial, Inc.*, at p. 1399 [noting Black's Law Dictionary (8th ed. 2004) p. 813, col. 2 defines "instrument" as "[a] written legal document that defines rights, duties, entitlements, or liabilities, such as a contract, will, promissory note, or share certificate"].) Under these definitions, the informed consent form constitutes a written instrument for purposes of applying Evidence Code section 622, and the factual recitals conclusively bind plaintiff.

For all of the reasons provided above, we conclude the court correctly granted summary judgment on plaintiff's cause of action for breach of contract.

II. *Demurrers*

A. *Standard of Review*

On appeal from a judgment of dismissal entered after a demurrer has been sustained without leave to amend, the issue is whether, assuming the truth of all well pleaded facts and those subject to judicial notice, the complaint alleges facts sufficient to state a cause of action. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126; *Crowley v. Katleman* (1994) 8 Cal.4th 666, 672; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) We disregard contentions, deductions or conclusions of fact or law. (*Zelig*, at p. 1126.) " 'Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained . . . without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.' " (*Ibid*.)

B. *Battery Cause of Action*

Plaintiff challenges an order sustaining defendants' demurrer to her second amended complaint's third cause of action for battery in which she alleged the defendants removed her gallbladder, pancreas, spleen and duodenum without her parents' consent. To establish a claim for civil battery, a plaintiff must prove: (1) the defendant intentionally acted in a way that resulted in a harmful or offensive contact with the plaintiff; (2) the plaintiff did not consent to the contact; and (3) the harmful or offensive contact caused injury, damage, loss or harm to the plaintiff. (*Piedra v. Dugan* (2004) 123

Cal.App.4th 1483, 1495.) " 'Where a doctor obtains consent of the patient to perform one type of treatment and subsequently performs a substantially different treatment for which consent was not obtained, there is a clear case of battery.' " (*Ibid*, quoting *Cobbs v. Grant, supra*, 8 Cal.3d at p. 239; see also *Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 324-325 [distinguishing battery and lack of informed consent causes of action].)

We are not persuaded that the court erred in sustaining defendants' demurrer to this cause of action without leave to amend. Setting aside plaintiff's failure to set out coherent legal argument or analysis (which independently permits us to reject her arguments), plaintiff's allegations are contradicted by the consent forms she attached as exhibits to her second amended complaint, including that signed by her mother for the June 27 surgery, indicating that the surgery included "[r]emoval of pancreatic tumor[, which r]equires removal of duodenum [and m]ay require total removal of pancreas [and] possible removal of spleen." The consent form further states: "I consent to the performance of the procedure/surgery noted above, in addition to any different or further procedures, which in the opinion of my supervising or attending physician or surgeon, is indicated during the performance of the procedure/surgery."

We accept as true the contents of these documents attached to the second amended complaint. (*Building Permit Consultants, Inc. v. Mazur* (2004) 122 Cal.App.4th 1400, 1409.) "Indeed, the contents of an incorporated document . . . will take precedence over and supercede any inconsistent or contrary allegations set out in the pleading. In the case of such a conflict, we will look solely to the attached exhibit." (*Ibid*.; see also *Dodd v. Citizens Bank of Costa Mesa* (1990) 222 Cal.App.3d 1624, 1627.) In view of the

attached consent form, plaintiff cannot allege her parents did not consent to the procedure that was performed. She has not persuaded us her allegations sufficiently state a cause of action for medical battery or that the court erred in sustaining defendants' demurrer to this cause of action without leave to amend.

C. *"Deceit" Cause of Action*

Plaintiff challenges the trial court's order sustaining the defendants' demurrers to her cause of action for "deceit" in her first amended complaint. She maintains her cause of action was based on the "fact that the plaintiff's (appellant) second operation . . . was a ghost surgery," and "[t]he defendants were collectively involved in a ghost surgery without the Plaintiff's parents' knowledge or consent . . ." Though it is difficult to understand, plaintiff's theory appears to be that, unbeknownst to her parents, her operation was allegedly performed by Timothy Canty, M.D., rather than Dr. Saenz. In her opening brief, plaintiff provides no meaningful explanation or analysis with application of the relevant standard of review. She does not explain how her allegations state a cause of action for deceit; she simply asserts an ipse dixit: that her facts do state such a cause of action.

"[T]he elements of an action for fraud and deceit based on concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or

suppression of the fact, the plaintiff must have sustained damage." (*Marketing West, Inc. v. Sanyo Fisher* (*USA*) *Corp.* (1992) 6 Cal.App.4th 603, 612-613; see also *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) Being a species of fraud, concealment must be pleaded with specificity. (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 878.) General and conclusory allegations will not suffice at the pleading stage, and the policy of liberal construction of the pleadings will not ordinarily be invoked to sustain materially defective fraud allegations. (*Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 73, 74; *Lazar*, at pp. 644-645; *Goldrich v. Natural Y Surgical Specialties, Inc.* (1994) 25 Cal.App.4th 772, 782.)

The fraud allegations in plaintiff's first amended complaint are argumentative legal contentions and conclusions, in part based on quotations from a section of what appears to be a treatise: "Section 2:10 of the California Medical Malpractice. . . ." We disregard such allegations in assessing the propriety of the court's order sustaining defendants' demurrers. Otherwise, her allegations are broadly asserted against numerous defendants without identifying any particular person or statement. For that reason, they plainly do not meet the strict pleading standards identified above. In short, plaintiff's first amended complaint does not contain sufficient allegations of actionable fraud (much less fraud by concealment), and thus the court properly sustained the demurrer to her deceit cause of action without leave to amend.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.